83-748

Office-Supreme Court, U.S.
FILED
NOV 4 1983
ALEXANDER L. STEVAS,
CLERK

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IN RE JOHN D. DELGADO

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

RAY P. MCCLAIN
100 Broad Street, Suite 200
Post Office Box 608
Charleston, S.C. 29402
(803) 577-3170
Attorney for Petitioner

Charleston, South Carolina

November 4, 1983

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the decision below, punishing Petitioner for participating in his client's statements to a reporter while a civil proceeding was pending on appeal, is in conflict with *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), and other decisions of this Court, which have held that out-of-court comments about pending lawsuits cannot be punished, consistently with the First Amendment, unless the rules require, and the court imposing the punishment finds, that the comments are extremely serious, and that there is an extremely high, imminent danger to the administration of justice.

2. Whether Petitioner was denied due process of law in that there was either no evidence, or no "clear and convincing" evidence, as shown by an independent review of the record, to support the conclusions that (1) Petitioner knew that his visit to his client with a reporter was "improper," or violated any rule, or that (2) Petitioner falsely or fraudulently misrepresented any fact in order to induce anyone to allow the interview.

INDEX

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	8
I. The discipline imposed in this case has punished Petitioner for facilitating publication of statements which did not pose, and were not found to pose, any probability of prejudice to the administration of justice in a civil case, much less to pose the immediate peril to fair proceedings required to justify punishment of conduct otherwise protected by the First Amendment	10
A. The opinion below is inconsistent with the substantive principles established by decisions of this Court for application of the First Amendment to the rules and facts in this case	11
B. All other lower courts considering trial comments by attorneys or litigants in civil cases have concluded that such public comments are protected by the First Amendment	12
II. The decision below conflicts with decisions of this Court requiring sufficient evidence as the basis for any punishment consistent with Due Process of Law	13
CONCLUSION	16

INDEX—Continued

APPENDICES Page

A. Opinion of the South Carolina Supreme Court.. 1a

B. Recommendation of the Executive Committee, Board of Commissioners on Grievances and Discipline for the South Carolina Supreme Court 10a

C. Recommended Findings of Fact and Conclusions of Law of the Hearing Panel of the Board of Commissioners on Grievances and Discipline for the South Carolina Supreme Court 13a

D. Constitutional and Other Provisions Involved.. 20a

TABLE OF CITATIONS

Cases: Page

A.C.L.U. v. Bozhardt, 539 F.2d 349 (4th Cir. 1976), cert. denied, 429 U.S. 1022 (1976) 10
Addington v. Texas, 441 U.S. 418 (1979) 15
Bridges v. California, 314 U.S. 252 (1941) 9, 11
Burns v. Clayton, 237 S.C. 316, 117 S.E. 2d 300 (1960) 7, 15
C.B.S., Inc. v. Young, 522 F.2d 234 (6th Cir. 1975) 13
Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970) 12
Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) 9, 12, 13
Cox v. Louisiana, 379 U.S. 536 (1965) 14
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 12
In re Gault, 387 U.S. 1 (1967) 16
Gannett Co. v. De Pasquale, 443 U.S. 368 (1979) 11
In re Halkin, 598 F.2d 176 (D.C. Cir. 1979) 13
Haynes v. Washington, 373 U.S. 503 (1963) 14
Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979) (en banc) 9, 12
In re Hodge, 290 S.E. 2d 237 (S.C. 1982) 4
In re Hodges, 303 S.E. 2d 89 (S.C. 1983) 9
Ex parte Hollman, 79 S.C. 9, 60 S.E. 19 (1908) 15
Jackson v. Virginia, 443 U.S. 307 (1979) 9, 14
In re Kitts, 276 S.C. 242, 277 S.E. 2d 602 (1981), and 294 S.E. 2d 787 (S.C. 1982) 4
Lalone v. United States, 164 U.S. 255 (1896) 15
Lambert v. California, 355 U.S. 225 (1957) 16
Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) 9, 11
Middlesex Ethics Committee v. Garden State Bar Association, —— U.S. ——, 102 S.Ct. 2515 (1982) 10
Nebraska Press Asso. v. Stuart, 427 U.S. 539 (1976) 11, 12
In re Oliver, 452 F.2d 111 (7th Cir. 1971) 13
Pell v. Procunier, 417 U.S. 817 (1974) 10
Pennekamp v. Florida, 328 U.S. 331 (1946) 9, 11

TABLE OF CITATIONS—Continued

	Page
In re Primus, 436 U.S. 412 (1978)	9
Rodgers v. United States Steel Corp., 536 F.2d 1001 (3d Cir. 1976)	13
In re Ruffalo, 390 U.S. 544 (1968)	9, 10, 15
Ruggieri v. Johns-Manville Products Corp., 503 F. Supp. 1036 (D.R.I. 1980)	13
Saxbe v. Washington Post Co., 417 U.S. 843 (1974)	10
Shadid v. Jackson, 521 F. Supp. 85 (E.D. Tex. 1981)	9, 13
In re Smith, 268 S.C. 259, 233 S.E. 2d (1977)	9
Smith v. Daily Mail Publishing Co., 442 U.S. 97 (1979)	12
Smyth v. Fleischmann, 214 S.C. 263, 52 S.E. 2d 199 (1949)	15
State v. Shaw, 273 S.C. 194, 255 S.E. 2d 799 (1979)	5
Stroble v. California, 343 U.S. 181 (1952)	12
Thompson v. City of Louisville, 362 U.S. 199 (1960)	9, 13
United States v. Unterman, 422 F. Supp. 228 (S.D.N.Y. 1976)	16
Watson v. Wall, 239 S.C. 109, 121 S.E. 2d 427 (1961)	15
Wood v. Georgia, 370 U.S. 375 (1962)	11

Other Authorities:

Court Rules:

Rule on Disciplinary Procedure, § 8	4
Disciplinary Rule 1-102(A)(4)	3, 8
Disciplinary Rule 7-107(G)	*passim*
Disciplinary Rule 7-108(B)(1)	3

Other Source:

Columbia Record, May 29, 1979	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. ———

IN RE JOHN D. DELGADO

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina entered in the above-styled case.

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina is reported at 306 S.E.2d 591 (S.C. 1983), and is appended hereto at 1a, Appendix A. The recommendation of the Executive Committee of the Board on Grievances and Discipline is unreported and is appended hereto at 10a, Appendix B. The recommended findings of fact and conclusions of law of the Hearing Panel of the Board on Grievances and Discipline are unreported and are appended hereto at 13a, Appendix C.

JURISDICTION

The opinion of the Supreme Court of South Carolina was filed on August 8, 1983. This Court has jurisdiction to review the judgment below under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

The relevant provisions of the United States Constitution and of the Disciplinary Rules of the South Carolina Supreme Court are set forth in Appendix D, *infra*, 20a.

STATEMENT OF THE CASE

Petitioner has been an active member of the State Bar of South Carolina, engaged primarily in trial practice, since his admission to the Bar in 1975. The undisputed evidence of record in this proceeding was summarized by the Hearing Panel of the Board on Grievances and Discipline as follows, see *infra*, 18a-19a:

> "The Respondent has been an active member of the South Carolina Bar and has devoted a substantial amount of his time to community service. It further appears from the character witnesses who testified, as well as affidavits submitted by the Respondent without objection, that the Respondent is held in high esteem by his colleagues of both the bench and bar.
>
> * * * *
>
> ". . . [T]he Respondent has served the Bar and Community otherwise with integrity, thoroughness, and the capacity vested in the best of the profession. . . . Testimony from two Circuit Judges, a Solicitor, Law School Faculty, and several highly respected attorneys all attested to the Respondent's high qualities. . . ."

His activities include membership on the Board of Governors of the South Carolina Trial Lawyers Association, on the faculty of the National College of Criminal Defense, and chairmanship for many years of the Service to Indigents Committee of the South Carolina Bar Association.

This matter was initiated by a Complaint dated May 11, 1982, issued under the Rule on Disciplinary Proce-

dure of the Supreme Court of South Carolina.[1] The Complaint alleged two incidents constituting violation of three Disciplinary Rules in the Code of Professional Responsibility:[2] (1) that Petitioner improperly spoke with a juror sitting on a pending case [DR 7-108(B)(1];[3] (2) that Petitioner "participated" in an improper statement to the news media regarding pending civil litigation [DR 7-107(G)]; and (3) that the Petitioner's participation in the statement to the media involved fraud, deceit, or misrepresentation to enable a news reporter to interview his client [DR 1-102(A)(4)]. After preliminary proceedings, Petitioner filed an Amended Answer which admitted that the incidents occurred, but denied that he had engaged in any wrongful conduct or had any wrongful in-

---

[1] According to Petitioner's offer of proof, this Complaint was initiated by correspondence from one Russell Dixon, whose brother, Forrest Dixon, had been shot to death by his girlfriend, Mrs. Keith; petitioner had successfully defended Mrs. Keith on a murder charge under a plea of self-defense.

[2] See Appendix D. Although not identified in the Complaint, these Disciplinary Rules were specified by the State Attorney General at the hearing on this matter, and referred to by the court below in its opinion.

[3] The Hearing Panel reaching the following conclusion regarding this charge, *infra* 15a. "The Respondent obviously became involved in a situation which was, to say the very least, awkward. He was approached by a juror sitting on the case then in progress. He certainly did not want to offend the juror, but at the same time he used poor judgment in engaging in any conversation with any of the jurors in light of [DR7-108(B)(1)]. At the same time, this panel, after hearing all of the testimony and evidence, finds that the Respondent's talking with the jurors, while it may have been a technical violation of the Code of Professional Responsibility, we conclude that his doing so does not amount to conduct which warrants the imposition of any punitive sanction." The State Supreme Court construed DR7-108(B)(1) in a strict, prophylactic manner, so that Petitioner's lack of wrongful intent, as found by the Hearing Panel 14a-15a, was not relevant. Petitioner admitted that he continued a conversation in the presence of the sitting juror; this was held to be a per se violation of the Disciplinary Rule, 3a.

tentions, and particularly denied that he had engaged in any fraud, deceit, or misrepresentation. Petitioner also there asserted a number of constitutional defenses, including the questions presented here, asserting that his conduct with reference to the press interview with his client was constitutionally protected.

Petitioner does not seek review of the state court's prophylactic interpretation of the Rule regarding juror contact.[4] He does seek review of the court's disposition of the charges relating to the prison interview of his client. The facts of that representation may be summarized as follows.

At the request of the American Civil Liberties Union, Petitioner agreed to represent J. C. Shaw, on a *pro bono* basis, in an attempt to overturn the sentence of death that had been imposed on Mr. Shaw. Shaw had pleaded guilty to the murder of two teenagers, a brutal crime that involved the rape and mutilation of the body of one

---

[4] The distinction between a public reprimand and lesser punishment is critical in South Carolina, although it may be much less significant in other jurisdictions. In South Carolina, once an attorney is publicly reprimanded for misconduct, he *must* at least be suspended indefinitely from practice if he is ever found to have subsequently violated a disciplinary rule, no matter how technical the violation may be. Rule on Disciplinary Procedure, South Carolina Supreme Court, Section 8(C), 20a *infra*. The State Attorney General argued in this case below that *any* misconduct, even purely technical, must be subject to some sanction. In contrast, if an attorney receives only a private reprimand, the disciplinary authority has discretion, upon a subsequent proceeding, to impose a reprimand, public or private, rather than a suspension from practice. Section 8(D), 20a *infra*. In the modern practice of law, where simple negligence that hurts a client may become the subject of discipline, Petitioner is now on "permanent probation," in which even a good faith error in the conduct of a client's business could lead to his suspension or disbarment. In re Hodge, 290 S.E. 2d 237 (S.C. 1982); In re Kitts, 276 S.C. 242, 277 S.E. 2d 602 (1981), and 294 S.E. 2d 787 (S.C. 1982). Therefore, the possibility that reconsideration of Petitioner's punishment would result in a lesser sanction is critical to his career.

of the victims. *State v. Shaw*, 273 S.C. 194, 255 S.E. 2d 799 (1979).

Petitioner filed an application for post-conviction relief for Shaw in the South Carolina state courts in December, 1979. The hearing on the application for post-conviction relief began on January 27 or 28, 1980, and ended on February 6.

Because of the nature of the crime and the publicity that it had generated, petitioner reached the conclusion that public sentiment was strongly against his client and that this sentiment was having an adverse impact on his client's legal position, for example, by impelling the Attorney General to request an extraordinarily expedited hearing on the post-conviction petition, which lessened the time for proper preparation. As a result, petitioner decided that a press interview with his client might be advantageous because it could produce a more "balanced" public image of his client.

The post-conviction hearing concluded on February 6, 1980, and the trial judge rendered his ruling that same day. The interview in question took place a week later, on February 14. The resulting news article was not published until February 24, after the case was on appeal. On February 6, while everyone was waiting for the order from the judge on the petition for post-conviction relief, 306 S.E. 2d at 594, 5a:

> After inquiry from several members of the news media, Respondent set up an interview-press conference to be conducted at the end of Shaw's post-conviction hearing. Officials of SCDC [South Carolina Department of Corrections] approved the interview. Just prior to the interview taking place, prosecuting solicitor Anders refused to permit the interview and ordered Shaw returned to CCI [Central Correctional Institution].

The prosecutor never discussed with Petitioner, or his co-counsel, the reason or authority for cancelling the inter-

view. Anders told reporters that "he was not going to allow the news media to humanize an animal like Shaw."

At the request of a reporter of his acquaintance, Holly Gatling, Petitioner arranged for a conference with his client, Shaw, and allowed Ms. Gatling to accompany him for an interview in order "to show a balanced view of Mr. Shaw," 7a. Petitioner made no statements to Ms. Gatling for publication. Her article, according to an unrebutted exhibit presented by Petitioner referring to the transcript of the hearing on post-conviction relief, reported no facts that had not been introduced in testimony of public record.[5]

When Petitioner and Ms. Gatling arrived almost a half hour late for the interview, Petitioner hastily filled in a visitors' log that, according to undisputed evidence, was maintained solely for the purpose of advising the Warden *after* the fact of visits to prisoners. The log was not relied on in admitting Ms. Gatling, 19a. On this sheet, Petitioner identified Ms. Gatling as "L. H. Gatlin" (L. H. are her true initials and her name is often misspelled), and identified the purpose of their joint visit as "legal," using ditto marks. The Warden testified such practices were common, and were not, in his view, intended to be fraudulent; before publication of the article, the Warden promptly identified Ms. Gatling from reviewing the log entry. No evidence of alleged misrepresentation by Petitioner was offered except the visitors' log itself. See 306 S.E. 2d at 594-95, 5a-6a. The record below was undisputed that no corrections officials reviewed the

---

[5] Shaw's original criminal defense attorney approved and accompanied a reporter to an interview that resulted in front-page article with many quotes attributed to Shaw. Columbia Record, May 29, 1979, p. 1-A. No suggestion has been made that the initial attorney's conduct was a violation of any Disciplinary Rule on trial publicity.

log entry before Petitioner was admitted or until after he and Ms. Gatling had left, and the log entry was not relied on to admit them.

The conference with Mr. Shaw took about 45 minutes to an hour, and was conducted totally in an open area, constantly subject to observation by guards and other personnel of the prison.

The court below relied in part on an internal administrative policy described as follows, 306 S.E. 2d at 594, 5a:

> South Carolina Department of Corrections (SCDC) officials had adopted a policy governing press interviews with inmates on death row. The policy required the approval of: (1) SCDC officials; (2) the inmate's defense counsel; and (3) the prosecuting solicitor.

The Hearing Panel found that this policy was not made known to attorneys, 17a; there was no reason Petitioner should have known of the existence of the policy. Both he and the reporter denied such knowledge. The Court below did not find that Petitioner knew of the policy.

The Panel of the Board on Grievances and Discipline that initially conducted a hearing in this matter, the only tribunal to hear testimony from Petitioner and other witnesses, found that no disciplinary violations had occurred, except perhaps a technical violation as to the juror contact (not at issue here). The Hearing Panel recommended that the Complaint be dismissed and that *no* sanction be imposed. 19a. The Executive Committee, rather curiously, adopted the findings of the Hearing Panel, 11a, but recommended that a public reprimand be administered. The Supreme Court, which has the ultimate responsibility for setting a sanction, *Burns v. Clayton*, 237 S.C. 316, 117 S.E. 2d 300 (1960), reviewed the

record and found, as to the prison interview, that Petitioner had violated DR 7-107(G)(2) which prohibits counsel in a civil action from:

> "participat[ing] in making an extrajudicial statement, other than a question from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to . . . [t]he character, credibility, or criminal record of a party . . . ."

The Supreme Court also purported to find that Petitioner had violated DR 1-102(A)(4) because he, 306 S.E. 2d at 595, 6a:

> "wished to obscure [Ms. Gatling's] true identity and purpose of the visit . . . . [H]e was well aware of the fact that the interview by Ms. Gatling under the circumstances was improper."

The only evidence cited for this conclusion was Petitioner's notation in the visitors' log, and the circumstance that prosecuting attorney Anders had, without explanation, prevented the press conference on February 6, 1980. 5a. The State Court condemned, 306 S.E. 2d at 595, 8a, Petitioner's explanation that he considered it an important part of his "legal" representation of Shaw to counter the hostile community view that was affecting, detrimentally, the legal process and Shaw's exercise of post-conviction relief rights.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the record does not support, nor did the state court declare, that any comments to the press were likely to, or did, create a serious risk of highly imminent danger to the administration of justice in the civil proceeding that was on appeal at the time. The decision below is thus in conflict

both with the decisions of this Court construing First Amendment protections as applied to comments to the press regarding lawsuits, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Pennekamp v. Florida*, 328 U.S. 331 (1946); and *Bridges v. California*, 314 U.S. 252 (1941); and is squarely in conflict with decisions of other lower courts that have considered the facial constitutionality of the restrictions in Disciplinary Rule 7-107(G) regarding civil proceedings, all of which have held the rule to violate the First Amendment, *Hirschkop v. Snead*, 594 F. 2d 356 (4th Cir. 1979) (en banc); *Chicago Council of Lawyers v. Bauer*, 522 F. 2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *Shadid v. Jackson*, 521 F.Supp. 85 (E.D. Tex. 1981).

The decision below was further in conflict with the requirement of due process of law in that there was no clear and convincing evidence that Petitioner, in signing the prison visitors' log for himself and the reporter, had any motive to, or in fact did, misrepresent any fact for the purpose of inducing their admittance for the interview. *Jackson v. Virginia*, 443 U.S. 307 (1979); *Thompson v. City of Louisville*, 362 U.S. 199 (1960); cf. *In re Ruffalo*, 390 U.S. 544 (1968). The Hearing Panel's finding that their admittance was *not* induced by the log entry was not disturbed by the court below.

Petitioner has thus been subjected to professional discipline on a basis completely inconsistent with constitutional protections, in connection with his efforts on behalf of a client whose case he undertook for the American Civil Liberties Union.[6] His objective here is most limited. He seeks only a ruling that the discipline imposed on him for enabling his client to speak to a reporter be re-

---

[6] The South Carolina Supreme Court has not proved to be particularly protective of the First Amendment rights of members of its bar. See In re Smith, 268 S.C. 259, 233 S.E. 2d 301 (1977), rev'd sub nom., In re Primus, 436 U.S. 412 (1978) (associational rights); In re Hodges, 303 S.E. 2d 89 (S.C. 1983), pet. for cert. pending, No. 83-184, 52 U.S.L.W. 3122 (advertising).

versed, the sanction be vacated, and the matter be remanded for a new hearing on sanction limited to the instance of allowing a juror to speak to him. (See footnotes 3 and 4, *supra*).

I. The discipline imposed in this case has punished Petitioner for facilitating publication of statements which did not pose, and were not found to pose, any probability of prejudice to the administration of justice in a civil case, much less to pose the immediate peril to fair proceedings required to justify punishment of conduct otherwise protected by the First Amendment.

The constitutional question initially presented has not been addressed by this Court in the context of a bar disciplinary proceeding, but the relevant principles are well established, and several lower federal courts have been unanimous in applying these principles to invalidate, on constitutional grounds, the rule invoked here to prohibit comment by attorneys[7] and litigants[8] involved in civil proceedings attacking the death penalty.[9]

---

[7] It may seem anomalous to punish Petitioner for "participating in an extra-judicial statement" when all that he did was to enable his *client* to talk to a reporter and to accompany the reporter to that interview. It may well be that DR 7-107(G) does not provide fair notice that such conduct could be construed as "participating" in a statement, so that the punishment violates due process. Cf. In re Ruffalo, *infra*.

[8] If attorneys are to be punished for helping their clients exercise First Amendment rights, it will become virtually impossible for clients to obtain legal assistance in this regard. The client has no way to help protect the attorney from discipline, since such disciplinary matters are immune from collateral attack. See Middlesex Ethics Committee v. Garden State Bar Association, —— U.S. ——, 102 S.Ct. 2515 (1982); A.C.L.U. v. Bozhardt, 539 F.2d 340 (1976), cert. denied, 429 U.S. 1022 (1976).

[9] The cases cited by the court below regarding prisoner interviews are inapposite. Saxbe v. Washington Post Co., 417 U.S. 843 (1974), and Pell v. Procunier, 417 U.S. 817 (1974), held that prisoners could be absolutely prohibited from talking to media representatives on an individual basis where the record supported the contention of prison officials that allowing *any* such individ-

A. *The opinion below is inconsistent with the substantive principles established by decisions of this Court for application of the First Amendment to the rules and facts in this case.*

This Court, in a unanimous opinion by Chief Justice Berger, recently reaffirmed the principle that "out-of-court comments concerning pending cases" cannot be punished unless such comments " 'be extremely serious and the degree of imminence [of danger to the administration of justice] be extremely high . . . ." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 845 (1978), citing *Bridges v. California*, 314 U.S. 252 (1941), and *Pennekamp v. Florida*, 328 U.S. 331 (1946). See also *Gannett Co. v. De Pasquale*, 443 U.S. 368, 448 (1979) (Blackmun, J., dissenting) ("strict and inescapable necessity"); *Wood v. Georgia*, 370 U.S. 375 (1962).

The state court had a responsibility, noted in *Landmark Communications, Inc. v. Virginia, supra*, 435 U.S. at 844, to:

> "examine for itself 'the particular utteranc[e] here in question and the circumstances of [its] publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify [subsequent] punishment.' Bridges v. California, 314 U.S., at 271."

In the present case, the state court made no inquiry whatever as to these factors. Two facts in particular show that there was no danger here. First, nothing was published in this case that was not already a matter of public record. *Nebraska Press Asso. v. Stuart*, 427 U.S.

---

ualized interviews was a threat to institutional security because of the attitudes developed by prisoners who became celebrities. Here, individual inmate interviews were freely allowed, and no security problems had ever occurred with press interviews of death row inmates. The only reason for preventing interviews with Shaw was to prevent the media from letting the public know he was a human being, not an "animal" as the prosecutor repeatedly called him.

539, 568 (1976); cf. *Smith v. Daily Mail Publishing Co.*, 442 U.S. 97, 102-3 (1979); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975). Second, the time between the interview and any possible further jury proceedings in the Shaw case[10] show that the interview could not have prevented a fair trial to any party.[11] See *Nebraska Press Asso. v. Stuart*, *supra*, 427 U.S. at 554 (1976), citing *Stroble v. California*, 343 U.S. 181 (1952) (6-week gap between publicity and trial); *Chase v. Robson*, 435 F. 2d 1059, 1061 (7th Cir. 1970) (seven months between publicity and issuance of gag order).

Thus, this Court's "precedents leave little doubt as to the proper outcome of such an inquiry." 435 U.S. at 844. The interview that Petitioner facilitated could not, in any way, have undermined the fair administration of justice.

B. *All other lower courts considering trial comments by attorneys or litigants in civil cases have concluded that such public comments are protected by the First Amendment.*

Relying on the principles just stated, each lower court that has considered the question has found the restraints in DR 7-107 on comments by attorneys in civil actions, as well as comments by attorneys in criminal matters after a jury verdict, to be unconstitutional on their face. *Hirschkop v. Snead*, 594 F. 2d 356, 372-73 (4th Cir. 1979) (en banc); *Chicago Council of Lawyers v. Bauer*,

---

[10] A minimum of a year could have been expected; as it, three-and-a-half years later, no jury trial proceedings have taken place, and none are imminent. Shaw's petition for habeas corpus is pending review by the United States Court of Appeals for the Fourth Circuit.

[11] The Disciplinary Rules regarding public comment by counsel do not even purport to apply after sentencing in a criminal matter, even when an appeal is taken to pursue a new trial, see Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 258 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976).

522 F. 2d 242, 257-59 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *Shadid v. Jackson*, 521 F. Supp. 85, 87 (E.D. Tex. 1981); *Ruggieri v. Johns-Manville Products Corp.*, 503 F. Supp. 1036 (D.R.I. 1980). One of these decisions was by the federal court of appeals for South Carolina. Yet the Supreme Court of South Carolina addressed these conflicting authorities most casually, 306 S.E. 2d at 596, 8a-9a:

> Respondent argues the unconstitutionality of the Code of Ethics violated. We find the same to be without merit. No case in this state has been cited and no opinion of the United States Supreme Court has been indicated. All other courts, in which there is scant authority, including the United States Circuit Courts of Appeal, are not binding on this Court and can, at most, be of interest or influencing.

The *Bauer* case had specifically referred to the section of the disciplinary rule which Petitioner allegedly violated, 522 F.2d at 259.

In addition to the cases directly on point as to the Disciplinary Rules, to the best of Petitioner's knowledge, all of the other lower courts that have considered restraints in civil cases have found them to be unconstitutional. *In re Halkin*, 598 F. 2d 176, 186-96 (D.C. Cir. 1979); *Rodgers v. United States Steel Corp.*, 536 F. 2d 1001, 1007-8 (3d Cir. 1976); *C.B.S., Inc. v. Young*, 522 F. 2d 234, 238 (6th Cir. 1975); *In re Oliver*, 452 F. 2d 111 (7th Cir. 1971).

II. The decision below conflicts with decisions of this Court requiring sufficient evidence as the basis for any punishment consistent with Due Process of Law.

Where there is no evidence of an offense, it violates Due Process to impose punishment. *Thompson v. City of Louisville*, 362 U.S. 199 (1960). Likewise, where the evidence fails to meet the requisite standard of proof, any finding based on such insufficient evidence violates

Due Process of Law. *Jackson v. Virginia*, 443 U.S. 307 (1979). These principles were completely ignored by the lower court in purporting to find that Petitioner engaged "in conduct involving dishonesty, fraud, deceit, or misrepresentation."

Even had the state court made a careful analysis of all the evidence and of the proper standard of proof, this Court has undertaken the responsibility of making an independent examination of the record in cases involving First Amendment protections. *Cox v. Louisiana*, 379 U.S. 536, 545 text at note 8 (1965). In the instant case, the principal disciplinary rule held violated was DR 7-107 (G), the rule prohibiting comment on pending civil litigation, and the court below added that the violations had been accomplished by means of conduct "involving dishonesty, fraud, deceit or misrepresentation." The two specifications of offenses are intimately entwined here, involving the same interview, and this Court's precedents require that this Court scrutinize the record, so that activity protected by the First Amendment is not punished under the assertion that the punishment is for some substantive evil, " 'else federal law could be frustrated by distorted fact finding.' *Haynes v. Washington*, 373 U.S. 503, 515-516. . . ." quoted in *Cox v. Louisiana*, *supra*, 379 U.S. at 545 n. 8. This concern is particularly critical in the present case because the Hearing Panel, the only tribunal to hear Petitioner testify, credited Petitioner's explanation of his actions and rejected the implication that he had made any false or fraudulent statement in completing the visitors' log. See text and footnote 14, below. Thus, the decision below, in finding fraudulent conduct, overturned the conclusion of "no fraud" made by the only officials who heard the testimony of Petitioner and other witnesses.

The court below did not, in this proceeding, address the issue of the standard of proof required to sustain a disciplinary sanction. Petitioner submits that "clear and

convincing evidence" is the proper standard of proof in this "quasi-criminal" disciplinary proceeding, *In re Ruffalo*, 390 U.S. 544, 551 (1968), as in other "quasi-criminal" proceedings; cf. *Addington v. Texas*, 441 U.S. 418, 424 (1979). The South Carolina courts have previously recognized the "clear and convincing evidence" standard for matters of bar discipline. *Burns v. Clayton*, 237 S.C. 316, 334, 117 S.E. 2d 300, 309 (1960). This standard is particularly required as to the allegation of fraud, since fraud must be proved by clear and convincing evidence.[12] The standard of proof was not discussed in the opinion under review, and the evidence, if there was any at all of fraud, misrepresentation, or similar misconduct, was not "clear and convincing."

Conduct cannot be fraudulent under South Carolina law unless that conduct is intended to induce action by another, and is relied upon by the other.[13] Here there was no evidence that the Petitioner knew that press interviews of death row prisoners needed special clearance, nor that the prosecutor had any role in press interviews at the prison, nor that the prison visitors' log was ever used to exclude persons from visiting. The Hearing Panel found that prison officials did not rely on the log entry, 19a; the court below did not contradict this finding. The only tribunal to hear Petitioner testify, the Hearing Panel, credited his explanation that he made the log entry in accordance with his usual practice, and rejected the contention that he had made any false statement.[14]

---

[12] Watson v. Wall, 239 S.C. 109, 121 S.E. 2d 427, 429 (1961); Lalone v. United States, 164 U.S. 255, 257 (1896).

[13] See, e.g., Smyth v. Fleischmann, 214 S.C. 263, 52 S.E. 2d 199, 202 (1949). Here, there was an undisturbed finding that Petitioner's log entry was not relied upon in granting the reporter access to Shaw. South Carolina also appears to equate "dishonesty" with "fraud": cf. Ex parte Hollman, 79 S.C. 9, 60 S.E. 19, 27 (1908).

[14] 17a. At another point in its findings, the Hearing Panel concluded, 19a: "any violations would be technical ones and, in

Thus there was no evidence presented that Petitioner, in signing the visitors' log, had any motice to misrepresent any fact with the intention of inducing action, nor was there any evidence that he induced any action by signing the log.[15] Further, to discipline Petitioner, as the decision below appears to, for violating the rule against unapproved press interviews, of which he knew nothing, 17a, is plainly in conflict with this Court's decision in *Lambert v. California*, 355 U.S. 225 (1957).

CONCLUSION

Petitioner has been placed on permanent probation in the practice of law in a decision that is flatly inconsistent with every relevant decision, both of this Court and lower courts, construing the rights of attorneys and litigants to exercise First Amendment rights. DR 7-107(G) is unconstitutional, both on its face and as here applied.

---

view of the circumstances, fraught with considerable doubt. In view of our conclusion that the Respondent has served the Bar and Community otherwise with integrity, thoroughness and the capacity vested in the best of the profession, such doubt should be resolved in favor of the Respondent. Testimony from two Circuit Judges, a Solicitor, Law School Faculty, and several highly respected attorneys all attested to the Respondent's high qualities which are taken into account." There is no indication that either this undisputed evidence or Petitioner's demeanor was taken into account in any way by the opinion of the State Supreme Court.

[15] Fair notice must address "the specific issues that [the accused] must meet." In re Gault, 387 U.S. 1, 34 n.54 (1967); In re Ruffalo, *supra*. The Complaint herein alleged that Petitioner represented that a news reporter was his co-counsel. Petitioner was instead disciplined for representing that the purpose of his visit with the reporter to his client was "legal." The concept of an attorney's duty in legal representation has been construed quite broadly, in helping to educate his client. United States v. Unterman, 422 F. Supp. 228, 238-39 (S.D.N.Y. 1976). Why should legal representation not reasonably extend to helping his client educate the public, as Petitioner was doing here, and as his predecessor had done?

The decision also purports to find Petitioner guilty of fraudulent conduct without evidence of the essential element of inducement in fraudulent conduct and without addressing or utilizing the standard of proof required both by the United States Constitution and by controlling decisions of the court below. The Hearing Panel was correct in concluding no false statement was made by Petitioner and no action was induced by him.

For these reasons, the petition for a writ of certiorari to the Supreme Court of South Carolina should be granted.

In the alternative, the record is so plain that the court below did not make any findings, nor could the record have supported any findings, either of a threat to the administration of justice or of conduct intending or affecting inducement, a necessary element of fraud, that summary reversal would be justified on this record, with remand for proceedings consistent with such reversal.

Respectfully submitted,

RAY P. MCCLAIN
100 Broad Street, Suite 200
Post Office Box 608
Charleston, S.C. 29402
(803) 577-3170
Attorney for Petitioner

Charleston, South Carolina

November 4, 1983

APPENDICES

APPENDIX A

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE MATTER OF JOHN DENNIS DELGADO,
Respondent.

Opinion No. 21968

Filed August 8, 1983

PUBLIC REPRIMAND

Attorney General T. Travis Medlock and Assistant Attorney General Clifford O. Koon, Jr., both of Columbia, for complainant.

Heyward E. McDonald, of Columbia; and Ray P. McClain, of Charleston, for respondent.

PER CURIAM: This attorney grievance matter comes before the Court as a result of a recommendation of public reprimand by the Executive Committee of the Board of Commissioners on Grievances and Discipline. The Respondent, John Delgado, is charged with communicating with a juror in violation of Rule 32 of this Court, DR 7-108(B)(1). He is also charged with having surreptitiously aided a newspaper reporter in gaining entrance to the South Carolina Central Correctional Institute (CCI) for the purpose of interviewing J. C. Shaw, one of his clients who was under sentence to death. His representation of Shaw involved an application in the Court of Common Pleas for post conviction relief, a civil action permitted by § 17-27-10 *et seq.* of the Code of Laws of South Carolina (1976). We agree with the Board that a public reprimand is the appropriate sanction.

The Constitution of South Carolina imposes upon this Court the ultimate authority in disciplinary matters. *Burns v. Clayton*, 237 S.C. 316, 117 S.E.2d 300 (1960). We may impose sanction in keeping with our view of the evidence independent of the recommendation of the Executive Committee of the Board. Our decision may be for the same or for different reasons.

I.

Respondent was defense counsel at the criminal trial in the case of *State v. Binkley*. Following the return of a guilty verdict, jurors were drawn to try the case of *State v. Schnupper*. Respondent was also counsel for that defendant. After brief proceedings, all jurors were excused for the day.

Two jurors, Seigler and Jumper, who had served only on the *Binkley* case, were approached by Respondent on the courthouse premises to determine how he might improve his trial skills. Discussion of the *Binkley* case progressed for five to ten minutes when Jenkins, a third juror, approached the group. Jenkins had also served on the *Binkley* case and had been selected to act on the *Schnupper* case.

Respondent testified that Jenkins requested permission to join the group and that he replied, "Yes, but we cannot talk about the case we're trying now." The *Binkley* case was discussed for another five to twenty minutes and included what Respondent refers to as "jury dynamics."

The testimony of the three jurors at the Panel hearing indicates that topics discussed included Respondent's view of a lawyer's role in defending a person he knows to be guilty. Juror Jenkins testified that he asked Respondent some "human interest" questions about his background, legal training, etc., and that he came away from the conversation "impressed" with Respondent.

That contact was reported to the presiding judge who held a brief hearing to determine whether the trial should continue. He ruled that the trial go forward with Jenkins remaining as a juror. Witness Joseph C. Sparks of the Sheriff's Department, who reported the contact, testified: "And I overheard him [Delgado] say that the tables were stacked against the Defense because the Prosecution had such resources to work with to make a case." Respondent Delgado was found in contempt of court for conversing with a juror during the course of a trial and consequently causing a delay in the proceedings.

Respondent's own admissions constitute a clear violation of DR 7-108(B)(1) which provides:

> (B) During the trial of a case:
>
> (1) A lawyer connected therewith shall not communicate or cause another to communicate with any member of the jury.

Respondent has argued that he was presented with a "Hobson's choice" in that he risked offending the juror by refusing to converse with him or possibly violating a disciplinary rule. The wording of DR 7-108(B)(1) could not be less ambiguous. The rule is intended not only to prevent an intentional attempt to bias or prejudice a juror but to prevent the appearance of impropriety and the possibility of one attorney gaining advantage in a trial by befriending or becoming intimate with a juror through "innocent" conversation. Ethical Consideration 7-29 of the rules emphasizes the total prohibition before and during a trial. It admonishes attorneys to exercise their utmost discretion in communications with jurors or potential jurors even *after* a trial.

The U. S. Fifth Circuit Court of Appeals recently noted that ". . . jurors, even after completing their duty, are entitled to privacy and protection against harassment." *In Re Express-News Corp.*, 695 F.2d 807, 810 (5th Cir. 1982).

The prohibition of DR 7-108(B)(1) is absolute. It requires that an attorney in Respondent's situation politely but immediately excuse himself from a conversation with (or one joined by) a sitting juror or "with anyone he knows to be a member of the venire from which the jury will be selected for the trial of [a] case" in which he is counsel. DR 7-108 (A) and (B).

In former years, it was considered the better practice that attorneys refrain altogether from approaching a juror relative to the action of the juror (and the jury) in a case already tried. This limitation has been somewhat watered down by DR 7-108(D). It provides:

> After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.

While the rule has been somewhat relaxed, an attorney approaching a juror after a verdict is rendered, does so at his own peril. Approaching jurors normally serves no purpose other than to satisfy curiosity. The argument that counsel wishes to talk to a juror in an effort to improve his trial skills is more often an excuse and not a good reason.

While Respondent did not invite the "now sitting" juror to join in the conversation, he was the author of his own problem by making it possible for it to arise. Although not absolutely prohibited under all circumstances, the Court looks with disfavor upon officers of the court approaching jurors after a verdict has been written. Counsel can eliminate the possible embarrassment to himself and jurors by merely staying away from those who wrote a verdict in cases in which they are involved.

II.

Respondent represented CCI inmate J. C. Shaw (under sentence to death) in his post-conviction relief trial. Prior to this proceeding, South Carolina Department of Corrections (SCDC) officials had adopted a policy governing press interviews with inmates on death row. The policy required the approval of: (1) SCDC officials; (2) the inmate's defense counsel; and (3) the prosecuting solicitor.

After inquiry from several members of the news media, Respondent set up an interview-press conference to be conducted at the end of Shaw's post-conviction hearing. Officials of SCDC approved the interview. Just prior to the interview taking place, prosecuting solicitor Anders refused to permit the interview and ordered Shaw returned to CCI.

Having been unsuccessful in arranging a press conference for his client at the court house at the end of the post-conviction hearing, Respondent agreed to take his friend, Holly Gatling, to the prison for an interview. She was a reporter for THE STATE, a local daily newspaper.

Respondent then called the prison and made an appointment through the Operations Section to meet with his client. A telephone message was delivered to the Warden from Operations stating: "Attorney John Delgado will be here at two o'clock February 14, 1980, to see J. C. Shaw." The Warden gave Operations his authorization for the meeting without any knowledge that Mr. Delgado was in fact arranging an interview for a newspaper reporter.

All visitors at CCI are required to sign a log book where they enter their name, driver's license number, whom they are to see, and the purpose of their visit. Respondent signed for both himself and Ms. Gatling.

The daily visitor's log reflects entries as follows:

Name	Driver's Lic. No.	Whom to Visit	Purpose of Visit	Name of Company Rep.
John Delgado	2137901	J. C. Shaw	Legal	Client
L. H. Gatlin	"	"	"	"

So far as the testimony shows, no legal business was attended. Ms. Gatling interviewed Shaw for forty-five minutes to an hour. She published a two-part story thereafter.

The only reasonable explanation of Respondent's failure to properly sign in Ms. Gatling is that he wished to obscure her true identity and purpose of the visit. From a reading of the entire record, it is inescapable that the Respondent was well aware of the fact that the interview by Ms. Gatling under the circumstances was improper. In making the log book entries he: (1) spelled her surname incorrectly; (2) designated her "L. H. Gatlin" rather than "Holly Gatling", by which name she is usually known and which she uses as a by-line; (3) indicated that her appearance was legal and that the relationship was that of client. The evidence is susceptible of the inference that the Respondent made this interview available to Ms. Gatling because of his long-standing friendship with her and in order to curry favor with the press.

In attempting to justify his action, he contends that his conduct was ". . . in a continuation of my legal representation of Mr. J. C. Shaw. It was not a social visit or a religious visit. It was, in my mind, a legal visit. That's the reason I dittoed everything else in."

He further testified in response to a question:

> Q. And you took this action to enhance your client's position?
>
> A. Yes, sir, I did, because I thought the community sentiment was such that Mr. Shaw could benefit from

more media exposure that would benefit the character and the individual that we had come to know during the course of our representation.

Q. There is no question that accompanied (sic) Ms. Holly down there in connection with your representation of Mr. Shaw?

A. Absolutely. We were both there and as a furtherance in the course of my legal representation of J. C. Shaw. That's correct.

He also testified:

No, sir. I think that I have the responsibility as Mr. Shaw's Counsel to attempt to show him in a light that's most favorable to his legal proceeding. That case was concluded. Judge Peeples had already ruled. It was my attempt to show a balanced view of Mr. Shaw based on what I felt the community felt about my client, based on what I felt was inherent in the nature of his crime and more specifically, the facts of his crime.

Disciplinary Rule 7-107(G) provides:

A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:

. . . .

(2) The character, credibility, or criminal record of a party, witness, or prospective witness.

The trial resulting in the death sentence was, of course, a criminal proceeding but the post-conviction action was by statute a civil action. The action of the Respondent was clearly in violation of the rule quoted above. Al-

though the post-conviction hearing in which Respondent was involved had ended at the trial level, it was then and is still now in litigation. A new trial is sought. According to the Respondent's own testimony, the interview was for the purpose of enhancing his client's position. This was a misconception. Respondent misconceives his duty; it was his right to present the cause of his client in the various courts but it was not his responsibility to change the public image of his client. We hold that the interview was not a portion of legal representation and that Respondent knew, or should have known, that the interview was improper.

An interesting discussion of the rights of newspaper reporters to interview prisoners is to be found in *Saxbe v. Washington Post Company*, 417 U.S. 843, 41 L.Ed.2d 514, 94 S.Ct. 2811, and in *Pell v. Procunier*, 417 U.S. 817, 41 L.Ed.2d 495, 94 S.Ct. 2800. The gist of these rulings of the United States Supreme Court is to the effect that the press has no greater right of access to a prisoner than the general public. Prison authorities are allowed a wide discretion. Generally, only an inmate's lawyer, clergyman, relative, or a friend of the inmate has a right to visitations. Visitations may not be controlled by either the prisoner or his counsel. The effort to bring the interview under the umbrella of legal representation fails.

Respondent's conduct in this instance is made more culpable by the manner in which he misrepresented the purpose of his visit and that of his companion. His conduct in this regard is a violation of DR 1-102(A)(4), which provides:

> (A) A lawyer shall not:
>
> . . . .
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Respondent argues the unconstitutionality of the Code of Ethics violated. We find the same to be without merit.

No case in this state has been cited and no opinion of the United States Supreme Court has been indicated. All other courts, in which there is scant authority, including the United States Circuit Courts of Appeal, are not binding on this Court and can, at most, be of interest or influencing.

We agree with the Board of Commissioners on Grievances and Discipline that the Respondent is guilty of misconduct. He, therefore, stands publicly reprimanded.

/s/ J. Woodrow Lewis
C.J.

/s/ Bruce Littlejohn
A.J.

/s/ George T. Gregory, Jr.
A.J.

/s/ David W. Harwell
A.J.
J. B. NESS, A.J.,
not participating.

CERTIFIED TRUE COPY.

/s/ Reba D. Mims
Deputy Clerk
S. C. Supreme Court

APPENDIX B

THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

IN THE MATTER OF: JOHN D. DELGADO,
Respondent.

CERTIFICATION OF THE RECORD BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE TO THE SOUTH CAROLINA SUPREME COURT

Pursuant to Section 14(A)(3) of the Rule on Disciplinary Procedure, the following is a Certificate of the proceedings before the Commission in the captioned matter:

The original Notice and Complaint was filed with the Court on July 16, 1982, with a Conditional Admission and Consent to a Private Reprimand, which was denied by the Court on July 30, 1982. The original Answer was filed with the Court on September 22, 1982, with a Conditional Admission and Consent to a Public Reprimand, which was denied by the Court on October 8, 1982. The Respondent filed an Amended Answer on or about November 10, 1982, the original of which is enclosed.

The Complainant filed a Motion and Notice of Motion to Strike the Amended Answer on or about November 16, 1982, the original of which is enclosed. It was forwarded to the panel members on November 17, 1982.

The Respondent filed a Motion for Discovery on or about November 24, 1982, the original of which is enclosed. The Complainant filed a Return to Respondent's Motion for Discovery and Affidavit thereto on or about November 24, 1982, the original of which is enclosed. Chairman Richardson issued an Order answering both

the Motion for Discovery and Complainant's Return to Motion on November 29, 1982, the original of which is enclosed.

The matter came on for a panel hearing on December 2, 1982, in the Supreme Court Building before A. Milling Blalock, serving as Chairman, Frank A. Lyles and Marion S. Riggs. The Complainant was represented by Assistant Attorney General Clifford O. Koon, Jr. and the Respondent was represented by Attorneys David W. Robinson, II, and Ray P. McClain.

The Panel Report, the original of which is enclosed, was filed on or about January 5, 1983, and served upon the Respondent on the same day. The Panel Report recommended that the Complaint be dismissed. Respondent was advised of his right to file exceptions and supporting briefs within the twenty days required by Section 14 of the revised Rule.

The Complainant filed Exceptions to the Panel Report and a Brief in Support thereof on or about January 26, 1983, the original of which is enclosed. The Respondent filed a Memorandum in Reply to Complainant's Memorandum in Support of the Exceptions on or about February 18, 1983, the original of which is enclosed.

The matter came on for review by the Executive Committee on February 22, 1983. The Executive Committee, by a vote of 4 to 1, voted to adopt the panel's findings of fact and conclusions of law. Its independent recommendation as to sanction was a public reprimand. The one member opposed would have voted to adopt the panel report with a sanction of a private reprimand.

The original of the transcript of the panel hearing and exhibits thereto are enclosed.

The costs incurred by the Board in connection with this matter amount to $428.44 ($220.28 travel expenses and

per diem for panel members, and $208.16 for witness fees).

A copy of this Certification is being sent to Attorneys for the Respondent and to the Attorney General.

/s/ Donald V. Richardson
DONALD V. RICHARDSON
Chairman

Columbia, South Carolina
February 25, 1983

ATTESTED TO:

/s/ Barbara W. Hinson
BARBARA W. HINSON
Administrative Assistant to the
Board of Commissioners on
Grievances and Discipline

APPENDIX C

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

BEFORE THE BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE

IN THE MATTER OF JOHN D. DELGADO,
Respondent.

PANEL REPORT

The within matter came for a hearing on Thursday, December 2, 1982, in Columbia, South Carolina, before the undersigned Panel. The Respondent was represented by David W. Robinson, II, of Columbia, South Carolina, and Ray P. McClain, of Charleston, South Carolina. Clifford O. Koon, Jr., Assistant Attorney General of the State of South Carolina, presented the case for the Attorney General on behalf of the Complainant. The attorney for the Complainant renewed his motion to strike the Respondent's amended answer, or in the alternative to strike certain portions of the Respondent's answer. This panel again denied this motion.

The Respondent, John D. Delgado, was alleged to be in violation of Section 1-102(A)(4), Section 7-102(A)(5), Section 7-107(G)(2), and Section 7-108(B)(1) of the Code of Professional Responsibility and the Rule on Disciplinary Procedure.

On or about September 17, 1980, the Respondent was defense counsel for John Binkley, who was being tried in the Court of General Sessions of Lexington County, South Carolina. When that case was concluded, the Solicitor thereafter called for trial the case of State vs John Schnupper, whom the Respondent also represented. The jury panel was not excused inasmuch as their presence

was needed in the event it became necessary to draw another jury.

One afternoon during the trial of the Schnupper case, the judge excused all jurors, including those who were serving on the Schnupper case. They were to report back the next day. The Respondent, after he left the courtroom and as he was leaving the Lexington County Courthouse, asked to talk with William R. Seigler and Ms. Bonnie Jumper, who had been jurors on the jury which had tried John Binkley. Neither of these persons were sitting jurors on the Schnupper case. The Respondent testified that his intent in talking with these two jurors was to see if he could learn from their comments anything that might improve his skills in trying jury cases. While the Respondent was talking with these two jurors, a third juror, Mr. W. C. Jenkins, came up. Mr. Jenkins had been a juror on the Binkley case and was also a sitting juror on the Schnupper case. Mr. Jenkins asked to join the conversation. Although the Respondent did not protest Mr. Jenkins' joining the conversation, he did tell Mr. Jenkins that he could not in any way discuss anything about the case in which he, the Respondent, and Mr. Jenkins, the juror, were presently involved.

From the testimony presented before this Panel, there is no doubt that the three jurors and the Respondent engaged in a conversation. They all testified before this Panel that none of the Respondent's comments or their questions had anything to do with the Schnupper case.

DR-107(B)(1) provides that during the trial of a case, a lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury. The Respondent himself did not approach Mr. Jenkins, a sitting juror; instead, Mr. Jenkins approached the Respondent. There is not testimony to support a finding that anything said by the Respondent during the conversation was said for the purpose of attempting to

sway the juror who was presently sitting on the case which the Respondent was trying.

A deputy with the Lexington County Sheriff's Department did report to the Solicitor's office the fact that the Respondent had engaged in a conversation with the three jurors. The Solicitor then reported the matter to the presiding judge who then had a conference with the juror, Mr. Jenkins, as well as with the Respondent. While the record does not support a finding that the presiding judge found the Respondent to be in contempt of court, the record further shows that the judge determined that the Respondent had not done anything unethical so far as his talking with the sitting juror was concerned. In short, the presiding judge determined that the trial should continue. It appears that his primary concern was the fact that it was necessary to stop the trial of the Schnupper case, and interview the juror, Mr. Jenkins, and the Respondent to determine whether or not the trial should continue. While this panel is not bound by the ruling of the presiding judge, it does feel that the opinion of the presiding judge should be considered in reaching its decision.

The Respondent obviously became involved in a situation which was, to say the very least, awkward. He was approached by a juror sitting on the case then in progress. He certainly did not want to offend the juror, but at the same time he used poor judgment in engaging in any conversation with any of the jurors in light of DR1-107(B)(1). At the same time, this panel, after hearing all of the testimony and evidence, finds that the Respondent's talking with the jurors, while it may have been a technical violation of the Code of Professional Responsibility, we conclude that his doing so does not amount to conduct which warrants the imposition of any punitive sanction. At the same time, we hope the Respondent will in the future, if the occasion arises, never engage in any conversation with any member of the jury panel during any term of Court.

During the latter part of January, 1980, the Respondent represented one J. C. Shaw on a post-conviction relief hearing before the Court of Common Pleas in Richland County. The Respondent had not represented Mr. Shaw in his trial which resulted in Mr. Shaw's receiving the death penalty. The post-conviction hearing ended with a ruling adverse to Mr. Shaw. A press interview had been arranged for Mr. Shaw after the judge had announced his decision but never was held since the Solicitor cancelled it.

Thereafter on February 13, 1980, the Respondent called CCI to arrange a conference with his client, J. C. Shaw. On February 14, 1980, the Respondent appeared at CCI and had with him Ms. Holly Gatling who is a reporter with the State newspaper. CCI has a procedure whereby each visitor coming to CCI must sign in and state the person to whom the visit relates and the purpose of the visit. On February 14, 1980, the Respondent signed both his name and that of Ms. Gatling. State's Exhibit No. 4, which is a copy of the visitor's log, shows that the Respondent was coming to see his client, J. C. Shaw, and that the nature of his visit was legal and that J. C. Shaw was his client; at the same time, he also signed Ms. Gatling's name; he used ditto marks, as far as the person who was being visited and also for relationship and the purpose of the visit.

The Respondent testified at the hearing that Ms. Gatling had called him to see if he could arrange an interview for her with J. C. Shaw, and it does appear that that was the sole reason for the visit to CCI by the Respondent on February 14, 1980.

The South Carolina Department of Corrections on or about December 12, 1979, established procedural guidelines setting forth a procedure to be used in arranging press interviews with death row inmates. This policy is set forth in State's Exhibit No. 1 and provides that press interviews with death row inmates would be permitted

only after the Director of the Division of Public Information has received approval in writing from the inmate's defense attorney and the circuit solicitor who prosecuted the case.

The Respondent at the hearing testified that he was not aware of these procedural guidelines established by the South Carolina Department of Corrections, and it does appear that these procedural guidelines were not widely disseminated or posted where anyone other than employees of the South Carolina Department of Corrections would be aware of the same.

DR7-102(A)(5) provides that in its representation of a client, a lawyer shall not knowingly make a false statement of law or fact. On the surface it does appear that the Respondent when he visited CCI on February 14, 1980 did, when he signed the visitor's log, represent that Holly Gatling and he were both coming to visit his client, J. C. Shaw, to discuss legal matters when in fact Ms. Gatling was there for the sole purpose of obtaining an interview to assist her in publishing an article in the State newspaper. The Respondent testified before this Panel that it was his standard of practice that when he brought someone with him, to visit a client at CCI, he would enter the same information for that person as for himself since in most cases he would have someone with him such as his law clerk. While this Panel does not condone what the Respondent has done, in this instance it does not believe that his conduct in this respect would warrant imposition of any disciplinary sanctions against him.

DR7-107(G)(2) prohibits a lawyer associated with a civil action, during its investigation or litigation, from making or participating in the making of an extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication that relates to the character, credibility of criminal records

of a party to the action. The Respondent had represented J. C. Shaw in the post-conviction relief hearing which is a civil action. Through the Respondent's efforts, the newspaper reporter was able to interview his client, and at that time the Respondent knew that the information the reporter gained from the interview would be published in a newspaper with wide circulation. In fact the reporter herself testified that the article she prepared and which was published was made possible through her interview with J. C. Shaw. It appears that DR7-107 was adopted to assure that all parties have his or her case, criminal or civil, adjudicated by an impartial judge or jury. Although the Respondent's participation in making the extrajudicial statement may have been wrong on account of the manner in which the extrajudicial statement was obtained, this Panel does not feel that there was anyone to be influenced, inasmuch as the trial proceedings had ended at the time these statements were published in the State newspaper.

This Panel realizes that a lawyer has the duty to represent his client zealously, but his representation must be within the bounds of law. It is clear from the Respondent's testimony that he had put forth a lot of time and effort in representing Mr. Shaw, and that on account of the henious crime to which Mr. Shaw had pled guilty, the Respondent had gone through some trying times both physically and emotionally.

The Respondent was admitted to practice law in South Carolina in November, 1975. He was employed as Assistant Public Defender of Richland County until June, 1978. He then served as Executive Director of the Palmetto Legal Services until he entered the private practice of law in January, 1980. The Respondent has been an active member of the South Carolina Bar and has devoted a substantial amount of his time to community service. It further appears from the character witnesses who testified, as well as the affidavits submitted by the Re-

spondent without objection, that the Respondent is held in high esteem by his colleagues of both the bench and bar.

It could be argued that the Respondent did violate the Code as he knew the "Press Conference" with Shaw was denied and the sole purpose of the visit to CCI was for the interview which the Newspaper Reporter sought through the Respondent. Since CCI did not rely on the Sign-In Sheet in allowing the Newspaper Reporter in and since the interview was well after the Court had made its findings (therefore the statement, as earlier discussed, could not have been an attempt to influence the outcome of the Post-Conviction Relief action), any violations would be technical ones and, in view of the circumstances, frought with considerable doubt. In view of our conclusion that the Respondent has served the Bar and Community otherwise with integrity, thoroughness and the capacity vested in the best of the profession, such doubt should be resolved in favor of the Respondent. Testimony from two Circuit Judges, a Solicitor, Law School Faculty, and several highly respected attorneys all attested to the Respondent's high qualities which are taken into account. Although we are of the opinion that the Respondent in both situations may have used poor judgment, we find no evidence to support a finding that the Respondent has engaged in any conduct violative of any provisions of the Code of Professional Responsibility and the Rules on Disciplinary Procedure that would warrant any punitive sanctions against him. Therefore, it is our recommendation that the complaint be dismissed.

Respectfully submitted,

/s/ Frank A. Lyles
FRANK A. LYLES

/s/ A. Milling Blalock
A. MILLING BLALOCK

/s/ Marion S. Riggs
MARION S. RIGGS

APPENDIX D

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

United States Constitution, Amendment One:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment Fourteen:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule on Disciplinary Procedure of the South Carolina Supreme Court:

8. EFFECT OF DISCIPLINE

C. A person who, having been publicly reprimanded for misconduct, is thereafter found guilty of subsequent misconduct, shall be suspended for an indefinite period from the office of attorney at law, or permanently disbarred, depending upon the seriousness of such misconduct.

D. A person who having received two private reprimands for misconduct and is thereafter found guilty of subsequent misconduct shall be publicly reprimanded or suspended for an indefinite period from the office of attorney at law or permanently disbarred, depending on the seriousness of such misconduct.

Disciplinary Rules adopted by the South Carolina Supreme Court, Rule 32

Disciplinary Rule 1-102(A):

A lawyer shall not:

* * * *

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Disciplinary Rule 7-107(G):

A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:

* * * *

(2) The character, credibility, or criminal record of a party, witness, or prospective witness.

Disciplinary Rule 7-108(B):

During the trial of a case:

(1) A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.

Office - Supreme Court, U.S.
FILED
DEC 5 1983
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-748

In The Matter of:

JOHN D. DELGADO,

Petitioner.

REPLY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

T. TRAVIS MEDLOCK
Attorney General

JOSEPH A. WILSON, III
Chief Deputy Attorney General

RICHARD B. HALE, JR.
Senior Assistant Attorney General

CLIFFORD O. KOON, JR
Assistant Attorney General

Post Office Box 11549
Columbia, S C. 29211

ATTORNEYS FOR RESPONDENT.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-748

In The Matter of:

JOHN D. DELGADO,

Petitioner.

REPLY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

T. TRAVIS MEDLOCK
Attorney General

JOSEPH A. WILSON, III
Chief Deputy Attorney General

RICHARD B. KALE, JR.
Senior Assistant Attorney General

CLIFFORD O. KOON, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, S.C. 29211

ATTORNEYS FOR RESPONDENT.

INDEX

	Page
Questions Presented.....	ii
Table of Authorities.....iii	
Opinion Below.....	1
Jurisdiction.....	1
Provisions of State Law Involved..	2
Statement of the Case.....	2
Argument:	
I.....	7
II.....	16
Conclusion.....	19

QUESTIONS PRESENTED

I.

Does this Court have jurisdiction to grant review of a State Supreme Court decision where that decision was based upon adequate and independent grounds of state law?

II.

Does this Court have jurisdiction to grant review of a State Supreme Court decision where the Petition for Writ of Certiorari fails to present a substantial federal question?

TABLE OF AUTHORITIES

Cambron v. Canal Insurance Company, 269 S.E.2d 426, 246 Ga. 147 (1980)..... 9

Chemical Bank v. City Bank of Portage, 160 U.S. 646, 40 L.Ed. 568, 16 S.Ct. 417 (1896)..... 12

Edelman v. California, 344 U.S. 357, 97 L.Ed. 387, 73 S.Ct. 293 (1953)..... 13

Florida Bar v. Abrams, 402 So.2d 1150 (1981)..... 13

Florida Bar v. Peterson, 418 So.2d 246 (1982)..... 10

Fox Film Corporation v. Muller, 296 U.S. 207, 80 L.Ed. 158, 56 S.Ct. 183 (1935)..... 13

Honeyman v. Hanan, 300 U.S. 14, 81 L.Ed. 476, 57 S.Ct. 350 (1935)..... 14

In Re Bishop, 263 S.C. 289, 210 S.E.2d 235 (1974)..... 12

In Re Brooks, 292 S.E.2d 686 (Ga. 1982). 13

In Re Brown, 197 S.E.2d 814, 157 W.Va. 1 (1973)..... 10

In Re Cauthen, Eubanks, and Rowland, 267 S.C. 448, 229 S.E.2d (1976)..... 12

In Re Duncan, 81 S.C. 290, 62 S.E. 406 (1908)..... 12

In Re Elliott, 268 S.C. 522, 235 S.E.2d 111 (1977)..... 12

In Re Gadsden, 89 S.C. 352, 71 S.E. 952 (1911)..... 12

In Re Holman, ___ S.C. ___, 286 S.E.2d 148 (1982)..... 10

In Re Smith, 255 S.C. 347, 179 S.E.2d 35 (1971)..... 12

In The Matter Of John Dennis Delgado, 306 S.E.2d 591, ___ S.C. ___ (1983)..... 1

Jankovich v. Indiana Toll Road Comm., 379 U.S. 487, 13 L.Ed.2d 439, 85 S.Ct. 493 (1965)..... 15

Matter of Anonymous, ___ S.C. ___, 298 S.E.2d 450 (1982)..... 10

Matter of Davis, ___ S.C. ___, 280 S.E.2d 644 (1981)..... 13

Matter of Dewitt, ___ S.C. ___, 304 S.E.2d 270 (1983)..... 13

Matter of Easler, 275 S.C. 269, 269 S.E.2d 765 (1980)..... 13

Matter of McCain, 425 N.E.2d 645 (Ind. 1981)..... 13

Matter of Rothwell, ___ S.C. ___, 296 S.E.2d 870 (1982)..... 13

Matter of Ruben, 273 S.C. 154, 255 S.E.2d 348 (1979)..... 13

Matter of Terry, 394 N.E.2d 94 (Ind. 1979)..... 10

Pan Am Petroleum Corp. v. Superior Court of Delaware In and For New Castle County, 81 S.Ct. 1303, 366 U.S. 656, 6 L.Ed.2d 584 (1961)..... 18

President, Directors and Company of Commercial Bank v. Buckingham's Executors, 46 U.S. 317, 12 L.Ed. 169 (1847)..... 14

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614 (1955)..... 17

Rogers v. Jones, 214 U.S. 196, 53 L.Ed. 965, 29 S.Ct. 635 (1909)..... 14

State v. Atterbury, 124 S.E. 648, 129 S.C. 464..... 9

Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977)..... 14

Weil v. Neary, 278 U.S. 160, 73 L.Ed. 243, 49 S.Ct. 144 (1929)..... 8

OTHER AUTHORITIES:

14-3-640, CODE OF LAWS OF SOUTH CAROLINA (1976)..... 2

15-1-170, CODE OF LAWS OF SOUTH CAROLINA (1976)..... 2

28 U.S.C. 1257(3)..... 2

CONSTITUTION OF SOUTH CAROLINA, Article 4, §4..... 2

Code of Professional Responsibility, DR 7-107(G)..... 7

DR 1-102(A)(4)..... 6

DR 7-108(B)(1)..... 9

Rule 32, Rules of the Supreme Court of South Carolina..... 2

South Carolina Rule on Disciplinary Procedure..... 2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-748

In The Matter of:

JOHN D. DELGADO,

Petitioner.

REPLY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The Opinion below appears at 306 S.E. 2d 591, ___ S.C. ___ (1983), captioned as In The Matter of John Dennis Delgado. Petitioner has appended the opinion below as Appendix "A" to his Petition.

JURISDICTION

This Honorable Court is without jurisdiction to consider this Petition. Petitioner has attempted to invoke jurisdiction

pursuant to 28 U.S.C. 1257(3). However, for the reasons set forth below, Respondent respectfully submits that said section is inapplicable to the instant case.

PROVISIONS OF STATE LAW INVOLVED

CONSTITUTION OF SOUTH CAROLINA, Article 5, §4; §15-1-170, CODE OF LAWS OF SOUTH CAROLINA (1976); §14-3-640, CODE OF LAWS OF SOUTH CAROLINA (1976); Rule 32, RULES OF THE SUPREME COURT OF SOUTH CAROLINA; SOUTH CAROLINA RULE ON DISCIPLINARY PROCEDURE.

STATEMENT OF THE CASE

Petitioner is an attorney licensed to practice law in the State of South Carolina. This Petition seeks review of a finding by the Supreme Court of South Carolina that Petitioner was guilty of professional misconduct arising out of two unrelated incidents.

First, Petitioner was found to have improperly communicated with a juror in a case in which Respondent was appearing as defense counsel. In a term of General Sessions Court for Lexington County, South Carolina, Respondent appeared as defense counsel at the trial of a criminal defendant named Binkley. As soon as the verdict was rendered in the Binkley case a jury was drawn in the case of State v. Schnupper. Respondent also represented Schnupper and participated in his trial. The Schnupper jury panel included one William Jenkins, who had also served as a juror in the Binkley case.

During a break in the Schnupper trial two jurors, Seigler and Jumper, who had served only on the Binkley case, were approached by Petitioner and a discussion began concerning the Binkley trial. Shortly thereafter the group was approached by William Jenkins, who was told by Petitioner

that it would be permissible for him to join the conversation as long as the Schnupper trial was not discussed. The conversation continued for another five to twenty minutes with Jenkins present. During the course of this conversation "jury dynamics" were discussed, along with the role of an attorney defending one whom he knows to be guilty. Jenkins asked Petitioner several questions as to his background and came away "impressed" by Petitioner. Petitioner was also overheard to make remarks concerning how "the tables were stacked against the defense" in a criminal trial. Petitioner has never denied communicating with Juror Jenkins during the course of the trial. He does not seek review of this independent finding of professional misconduct.

The second incident in which the Court below found separate instances of profes-

sional misconduct involved Petitioner's participation in a press interview with one of his clients. Respondent was engaged to represent J. C. Shaw, a convicted murderer presently under sentence of death, in his post conviction relief proceedings. The trial on the post conviction relief question generated a large amount of media attention. At the close of the trial Petitioner attempted to arrange a press conference for his client which was disapproved by the prosecutor. The South Carolina Department of Corrections had a policy in place at all relevant times which required approval of Corrections authorities, defense counsel, and the prosecuting attorney before press interviews could be conducted with death row inmates.

Although Petitioner was aware of the prosecuting attorney's objections, he set out to arrange for Holly Gatling, a newspaper reporter and personal friend of

Petitioner, to interview Shaw at the Central Correctional Institute (CCI). For the reasons set out in its opinion the Court below found as a matter of fact that Petitioner had misrepresented the purpose of his and Ms. Gatling's visit to C.C.I. The Court further found as a matter of law that the misrepresentation was a violation of DR 1-102(A)(4), which prohibits a lawyer from engaging "in conduct involving dishonesty, fraud, deceit, or misrepresentation.

At various times in the proceedings below, Petitioner has admitted that his purpose in participating in the extrajudicial statements to the press was to "enhance his client's position," to "humanize" his client, and to "create a fair, neutral public environment for the disposition of [Shaw's] case." The Court below found this to be outside of the

range of acceptable behavior for attorneys dealing with the press and that, therefore, Petitioner had violated yet another provision of the Code of Professional Responsibility, DR 7-107(G).

ARGUMENT

This Court Lacks Jurisdiction to Grant Review in the Instant Case.

I

The Lower Court's Decision was Based on Adequate and Independent State Law Grounds.

Counsel for Petitioner has skillfully placed a spotlight on that portion of the opinion below which he apparently feels warrants federal review. In doing so he seeks to portray the action below as a series of decisions, each independently reviewable, rather than one decision based upon several separate and independent grounds. However, a cursory review of that opinion reveals that the Court

below based its decision to sanction Petitioner on three separate violations of the Code of Professional Responsibility, two of which were completely independent of any possible federal question. 1/ Pursuant to its rulemaking authority, 2/ the South Carolina Supreme Court amended Rule 32, Supreme Court Rules, effective March 1, 1973, to provide for the adoption of the Code of Professional Responsibility as a basis for disciplinary action in South Carolina. Having become a valid rule of Court, the Code of Professional Responsibility has had, at all relevant times, the force and effect of State Law. Weil v. Neary, 278 U.S. 160, 73 L.Ed. 243, 49 S.Ct.

1/ Section 5 of the South Carolina Rule on Disciplinary Procedure defines misconduct as, inter alia, violation of the Code of Professional Responsibility.

2/ Article 5, §4, Constitution of South Carolina; §§ 15-1-170 and 14-3-640, CODE OF LAWS OF SOUTH CAROLINA (1976).

144 (1929); State v. Atterbury, 124 S.E. 648, 129 S.C. 464, concurring opinion of Justice Aycock (1924); Cambron v. Canal Insurance Company, 269 S.E.2d 426, 246 Ga. 147 (1980).

Viewed in this light it becomes clear that each time the lower court found a violation of the Code of Professional Responsibility it also found a separate, adequate, and independent state law ground upon which it could base its decision to sanction the Petitioner for his professional misconduct. These grounds are analyzed below.

First, there is the unchallenged finding by the lower court that Petitioner violated DR 7-108(B)(1) by improperly communicating with a member of the jury in a case with which he was connected as a lawyer. There was never any question as to Petitioner's participation in the conversation with the juror. Following

his pattern of admitting the material allegations of this charge, Petitioner has not sought review of this finding of misconduct and the concomitant application of a sanction. In failing to seek such review, Petitioner virtually concedes that such finding is an adequate and independent state law ground upon which the lower court based its decision. Examples where the Supreme Court of South Carolina and other courts have disciplined attorneys for improper communications with jurors or their families are numerous. In Re Holman, ___ S.C. ___, 286 S.E.2d 148 (1982); Matter of Anonymous, ___ S.C. ___, 298 S.E.2d 450 (1982); Matter of Terry, 394 N.E.2d 94 (Ind. 1979); Florida Bar v. Peterson, 418 So.2d 246 (1982); In Re Brown, 197 S.E.2d 814, 157 W.Va. 1 (1973).

The Peterson case is particularly instructive because, as in the instant

case, there was no evidence that the offending attorney actually discussed the merits of the pending case with the jurors. Peterson appeared at a restaurant where two sitting jurors were eating during the lunch break in the trial of a case. Peterson then seated himself at the jurors' table and chatted with them while they had lunch. Although there was no evidence that Peterson discussed the pending case or directly attempted to "sway" the jurors, he was, nevertheless, publically reprimanded by the Florida Supreme Court.

Next, we must consider the finding that Petitioner misrepresented the purpose of his and Ms. Gatling's visit to C.C.I. The lower court set out the various elements of the misrepresentation in its opinion, so they need not be repeated here. It should suffice to say that the lower court made a factual determination that these elements constituted misrepresenta-

tion. Misrepresentation is, by express terms, a violation of DR 1-102(a)(4). Although Petitioner attempts to attack the sufficiency of this finding, it is clear that this Court will not disturb factual findings of a lower court. Chemical Bank v. City Bank of Portage, 160 U.S. 646, 40 L.Ed. 568, 16 S.Ct. 417 (1896). Thus, we have a second independent and adequate state law ground upon which the lower court based its decision to sanction Petitioner. Examples where attorneys have been disciplined for fraud, deceit, or misrepresentation abound. In Re Duncan, 81 S.C. 290, 62 S.E. 406 (1908); In Re Gadsden, 89 S.C. 352, 71 S.E. 952 (1911); In Re Smith, 255 S.C. 347, 179 S.E.2d 35 (1971); In Re Bishop, 263 S.C. 289, 210 S.E.2d 235 (1974); In Re Cauthen, Eubanks, and Rowland, 267 S.C. 448, 229 S.E.2d (1976); In Re Elliott, 268 S.C. 522, 235 S.E.2d

111 (1977); Matter of Ruben, 273 S.C. 154, 255 S.E.2d 348 (1979); Matter of Easler, 275 S.C. 269, 269 S.E.2d 765 (1980); Matter of Davis, ___ S.C. ___, 280 S.E.2d 644 (1981); Matter of Rothwell, ___ S.C. ___, 296 S.E.2d 870 (1982); Matter of Dewitt, ___ S.C. ___, 304 S.E.2d 270 (1983); In Re Brooks, 292 S.E.2d 686 (Ga. 1982); Matter of McCain, 425 N.E.2d 645 (Ind. 1981); Florida Bar v. Abrams, 402 So.2d 1150 (1981).

This Court has often ruled that it has no jurisdiction to review the judgment of a state court which rests upon two grounds, one of which is federal and the other non-federal in character if the non-federal ground is independent of the federal ground and adequate to support the judgment. Fox Film Corporation v. Muller, 296 U.S. 207, 80 L.Ed. 158, 56 S.Ct. 183 (1935); Edelman v. California,

344 U.S. 357, 97 L.Ed. 387, 73 S.Ct. 293 (1953); Chemical Bank v. City of Portage, supra; Rogers v. Jones, 214 U.S. 196, 53 L.Ed. 965, 29 S.Ct. 635 (1909); Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977). As we have seen above, the lower court in the instant case had more than one independent and adequate state law ground upon which it based its decision.

It has also been held by this Court that it is not enough that a federal question may have been raised and overruled in the state court, but it must be shown that the federal question was controlling in the disposition of the case. President, Directors and Company of Commercial Bank v. Buckingham's Executors, 46 U.S. 317, 12 L.Ed. 169 (1847); Honeyman v. Hanan, 300 U.S. 14, 81 L.Ed. 476, 57 S.Ct. 350 (1935). In fact, this Court has held that equal reliance on state and federal grounds by

the lower court was sufficient to preclude Supreme Court review. Jankovich v. Indiana Toll Road Comm., 379 U.S. 487, 13 L.Ed.2d 439, 85 S.Ct. 493 (1965). In Jankovich the defendant constructed a toll road parallel to an airport. The height of the toll booth violated a city ordinance regulating the height of structures near the airport. The Indiana Supreme Court held that the ordinance violated the just compensation clause of the Indiana Constitution as well as the 14th Amendment to the United States Constitution. This Court ruled that the equal reliance upon the Indiana Constitution by the lower court precluded federal review.

Applying the reasoning of the above-cited decisions to the instant case leads to the inescapable conclusion that this Court must deny review because the alleged federal question raised by Petitioner was not controlling in the disposition of the

cause below. At best, Petitioner can only show that his federal question was merely one of three independent grounds upon which the Court based its decision to sanction him for his professional misconduct. The Petition should, therefore, be denied for this reason alone.

II

The Petition Fails To Present A Substantial Federal Question

A reading of Petitioner's footnote number 4 reveals the true basis of this appeal and exposes the entire matter as being one of purely local interest. As footnote number 4 indicates, Petitioner has taken this action seeking to lessen the sanction imposed upon him by the lower court. Petitioner apparently feels that the lower court may opt for some lesser sanction if one or two of the findings against him are overturned by this Court.

Such an argument is rank speculation and has no place in a Petition for appellate review. Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614 (1955). In the Rice case this Court granted certiorari to consider the 14th Amendment claims of an Indian widow whose deceased husband had been denied burial in a "white only" cemetery. The Court later dismissed the writ as improvidently granted because it learned that the attorneys had failed to inform it that a statute enacted since the Iowa Supreme Court had ruled and before certiorari had been granted now forbade racially restrictive covenants in Iowa. In dismissing the case the Court stated:

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to

> satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants." 99 L.Ed. at 901.

In order to grant review this Court must find a substantial federal question as defined within the plain language of 28 U.S.C. 1257. That is, the case must involve a right or immunity created by the Constitution or Laws of the United States. Pan Am Petroleum Corp. v. Superior Court of Delaware In and For New Castle County, 81 S.Ct. 1303, 366 U.S. 656, 6 L.Ed.2d 584 (1961). In addition, it must be a question of substance. Rice v. Sioux City Memorial Park Cemetery, Inc., supra. Petitioner's attempt to lessen his sanction is, at worst, of interest only to himself. At best, it is a matter of purely local concern. Whether or not the lower court would lessen the sanction upon remand is a matter of speculation and not a proper concern for this Court.

CONCLUSION

For the above-stated reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

JOSEPH A. WILSON, II
Chief Deputy Attorney General

RICHARD B. KALE, JR.
Senior Assistant Attorney General

CLIFFORD O. KOON, JR.
Assistant Attorney General

BY: _____
ATTORNEYS FOR RESPONDENT.

Columbia, South Carolina

November 30, 1983.

MOTION FILED

NOV 30 1983

No. 83-748

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IN RE JOHN D. DELGADO

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

---

MOTION OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, INC. SEEKING LEAVE TO FILE A BRIEF AMICUS CURIAE

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, INC. AMICUS CURIAE URGING THE COURT TO GRANT PLENARY REVIEW TO THE PRESENT PETITION FOR A WRIT OF CERTIORARI

DALE T. COBB, JR.
(Counsel of Record)
BELK, HOWARD, COBB AND CHANDLER, P.A.
2344 Cosgrove Avenue
Charleston, S.C. 29405
803-554-4291

NATHAN M. CRYSTAL
NANCY C. MCCORMICK
305 University of South Carolina Law School
Columbia, S.C. 29208
803-777-4155

Attorneys for Amicus Curiae

November 30, 1983

WILSON - EPES PRINTING CO., INC. - 783-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-748

IN RE JOHN D. DELGADO

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

---

MOTION OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, INC. SEEKING LEAVE TO FILE A BRIEF AMICUS CURIAE URGING THE COURT TO GRANT PLENARY REVIEW TO THE PRESENT PETITION

The National Association of Criminal Defense Lawyers, Inc. hereby moves the Court for leave to file the accompanying brief amicus curiae urging the Court to grant plenary review in the above-entitled action. Petitioner has consented to the filing of the attached brief. The Attorney General of South Carolina has reserved judgment on whether to consent until his office has an opportunity to review the brief. The interests of the National Association in this case and its reasons for seeking

leave to file the attached brief are set forth in the section of the brief entitled "Interests of Amicus Curiae."

Respectfully submitted,

DALE T. COBB, JR.
(Counsel of Record)
BELK, HOWARD, COBB AND CHANDLER, P.A.
2344 Cosgrove Avenue
Charleston, S.C. 29405
803-554-4291

NATHAN M. CRYSTAL
NANCY C. MCCORMICK
305 University of South Carolina Law School
Columbia, S.C. 29208
803-777-4155

Attorneys for Amicus Curiae

November 30, 1983

TABLE OF CONTENTS

	Page
MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE	(i)
TABLE OF AUTHORITIES	iv
BRIEF OF AMICUS CURIAE	1
INTERESTS OF AMICUS CURIAE	1
ARGUMENT	5
I. THE COURT SHOULD GRANT PLENARY REVIEW OF THIS CASE	5
A. The Issue Of A Lawyer's First Amendment Right To Make Or Participate In A Press Interview While A Proceeding For Post-Conviction Relief Is Pending	5
B. The Issue Of The Standard Of Proof Required By The Due Process Clause Of The Fourteenth Amendment In Disciplinary Proceedings	7
C. The Court Should Not Be Deterred From Granting Certiorari Because The Petitioner Was Also Found In Violation Of Another Disciplinary Rule	9
II. IF THE COURT DOES NOT GRANT CERTIORARI, IT SHOULD SUMMARILY VACATE THE DECISION OF THE SOUTH CAROLINA SUPREME COURT BECAUSE THAT DECISION VIOLATES THE PRINCIPLE THAT REQUIRES SPECIFIC FINDINGS OF IMMINENT HARM TO THE ADMINISTRATION OF JUSTICE BEFORE A COURT MAY INFLICT PUNISHMENT FOR TRIAL PUBLICITY	10
CONCLUSION	11
APPENDIX	
Table of Disciplinary Rules	1a

TABLE OF AUTHORITIES

Cases: Page

Addington v. Texas, 441 U.S. 418 (1979) 8
Alessi v. Committee on Professional Standards, 103 S.Ct. 1763 (1983), *vac'g* 88 App. Div. 2d 1089, 451 N.Y. Supp. 2d 456 (1982) 11
Bates v. State Bar of Arizona, 433 U.S. 350 (1977) 8
Bridges v. California, 314 U.S. 252 (1941) 6
Burns v. Clayton, 237 S.C. 316, 117 S.E.2d 300 (1960) 7
Chaunt v. United States, 364 U.S. 350 (1960) 8
Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) 7
Craig v. Harney, 331 U.S. 367 (1947) 6
Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981) 6, 7
Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979) (en banc) 7
In re Delgado, 306 S.E.2d 591 (S.C. 1983) 6
In re Hodges, 303 S.E.2d 89 (S.C. 1983), *petition for cert. filed*, #83-184, 52 U.S.L.W. 3122 (July 29, 1983) 8-9
In re Primus, 436 U.S. 412 (1978) 8
In re Ruffalo, 390 U.S. 544 (1968) 8
In re Two Anonymous Members of the South Carolina Bar, 298 S.E.2d 450 (S.C. 1982) 10
Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) 6, 10
Michigan v. Long, 103 S.Ct. 3469 (1983) 9
Pell v. Procunier, 417 U.S. 817 (1974) 6
Pennekamp v. Florida, 328 U.S. 331 (1946) 6
Santosky v. Kramer, 455 U.S. 745 (1982) 8
Saxbe v. Washington Post Co., 417 U.S. 843 (1974) 6
Woodby v. I.N.S., 385 U.S. 276 (1966) 8

Constitution:

U.S. Const. amend. I 1, 2, 5, 6, 7, 11
U.S. Const. amend. XIV § 1 ..... 2, 4, 5, 7, 8, 11

TABLE OF AUTHORITIES—Continued

Court Rules: Page

S.C. Sup. Ct. R. 32, DR 1-102(A)(4), 22 S.C. Code Ann. (Law. Coop. 1982) 7

S.C. Sup. Ct. R. 32, DR 7-107(G), 22 S.C. Code Ann. (Law. Coop. 1982) 3, 5, 6, 7, 9

S.C. Sup. Ct. R. 32, DR 7-108(B)(1), 22 S.C. Code Ann. (Law. Coop. 1982) 9, 10

S.C. Sup. Ct. R. Disc. Proc. 8(C), 22 S.C. Code Ann. 166 (Law. Coop. 1982) 10

Article:

Freedman & Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum*, 29 Stan. L. Rev. 607 (1977) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-748

IN RE JOHN D. DELGADO

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

---

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, INC. AMICUS CURIAE URGING THE COURT TO GRANT PLENARY REVIEW TO THE PRESENT PETITION FOR A WRIT OF CERTIORARI

INTERESTS OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc., an organization with approximately 2,700 members, is the only national organization that represents exclusively the interests of members of the criminal defense bar. The Association urges the Court to review this case for two reasons. First, the Association has an interest in establishing the principle that a lawyer has a First Amendment right to make or participate in a press interview while a proceeding for post-conviction relief is pending, so long as no imminent threat exists to the integrity of any proceeding. Second, the Association has an interest in establishing the principle that the due

process clause of the Fourteenth Amendment requires clear and convincing evidence before a lawyer may be found guilty of a disciplinary violation. The decision of the South Carolina Supreme Court violates both principles.

1. The Principle that a Lawyer has a First Amendment Right to Make or Participate in a Press Interview While a Proceeding for Post-Conviction Relief is Pending, So Long as No Imminent Threat Exists to the Integrity of Any Proceeding.

An attorney could have a number of legitimate reasons for making or participating in a press interview during a proceeding for post-conviction relief—reasons based either on his role as a representative of his client or as an individual who is entitled to First Amendment rights. For example, if the defendant has been sentenced to death, his attorney might reasonably conclude that his best strategy is to lay the groundwork for a clemency petition; that clemency is unlikely unless the public attitude is favorable; and that a press interview is necessary in order to restore some "balance" to the public image of his client. Similarly, a lawyer might represent a client who has agreed to have an interview with the press. The lawyer's presence at the interview could be important to protect the client from making damaging statements, or to assist the client in dealing with difficult questions.

An attorney may also have legitimate reasons of his own for deciding to have a press interview:

> The attorney may be especially knowledgeable and concerned about aspects of needed law reform as illustrated by the client's case. In addition, the attorney will be knowledgeable about the specific case at issue and may feel particularly moved to speak out publicly about the injustices in that case. Finally, the attorney may be the subject of well-publicized personal attacks as a result of representing an unpopular client or cause and therefore may

> have an important personal stake in publicly setting the record straight.

Freedman & Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum*, 29 Stan. L. Rev. 607, 616 (1977).

In this case, petitioner participated in a press interview with his client for legitimate tactical reasons. Because of the nature of the client's crime—a brutal murder that included mutilation of the body of the victim—and the publicity that it had generated, petitioner believed that public sentiment was strongly against his client and that this sentiment was having an adverse impact, in subtle ways, on his client's legal position. (Tr. 138, 151). Indeed, the prosecutor in the case labeled petitioner's client as "an animal." (Tr. 102-03; cf. Tr. 14-15; 41). Petitioner, hoping to combat this negative image, arranged for a press interview with his client. (Tr. 147, 151-52, 153). At the time of the interview, the likelihood of harm to any proceeding was remote because the judge had already issued an order in the post-conviction proceeding denying relief. If a new trial were granted, it would be years in the future.

The South Carolina Supreme Court disciplined petitioner in part because he participated in an interview between his client and a newspaper reporter. The Court based its decision on Disciplinary Rule 7-107(G) of the Code of Professional Responsibility (See Table of Disciplinary Rules). The Court rejected petitioner's argument that arranging for an interview was a legitimate part of legal representation. In addition, the Court held that 7-107(G) was constitutional, rejecting without analysis the decisions of the Fourth and Seventh Circuits, both of which held that the rule was unconstitutional on its face.

2. The Principle that the Due Process Clause of the Fourteenth Amendment Requires Clear and Convincing Evidence before a Lawyer may be Found Guilty of a Disciplinary Violation.

Members of the criminal defense bar are often subject to public criticism and antagonism because of their roles in defending and sometimes obtaining acquittal of individuals the public believes to be guilty. Unfortunately, the criticism is not limited to the public. Some members of the legal profession and of the judiciary view criminal defense lawyers with hostility. Because of these attitudes, criminal defense lawyers, more than other members of the profession, are vulnerable to charges of misconduct and in need of the protections of due process. Indeed, this case presents a striking example of the plight of a criminal defense lawyer. Petitioner's proffer of evidence at the disciplinary hearing would have shown that the complainant was a disgruntled relative of a victim of a client that petitioner successfully represented on murder charges. (Tr. 135-36, 156-57).

The decision of the South Carolina Supreme Court failed to protect petitioner's due process rights. The Court found that petitioner engaged in misrepresentation when he signed a log on his own behalf and on behalf of a newspaper reporter who accompanied him for an interview with his client at the prison where his client was incarcerated. The Court did not articulate or apply a standard of proof, and it ignored overwhelming evidence that the petitioner did not act deceptively.

ARGUMENT

The Court should grant plenary review of this case because it involves two significant questions. First, does a lawyer have a First Amendment right to make or participate in a press interview while a proceeding for post-conviction relief is pending? Second, what is the standard of proof required by the due process clause of the Fourteenth Amendment for finding an attorney guilty of misconduct in a disciplinary proceeding?

If the Court does not grant plenary review, however, it should summarily vacate the decision of the South Carolina Supreme Court because the decision violates the First Amendment principle that requires a court to make a finding in the record of "actual facts" that establish a clear and present danger to the orderly administration of justice before imposing punishment for trial publicity.

I. THE COURT SHOULD GRANT PLENARY REVIEW OF THIS CASE.

A. The Issue Of A Lawyer's First Amendment Right To Make Or Participate In A Press Interview While A Proceeding For Post-Conviction Relief Is Pending.

The South Carolina Supreme Court disciplined petitioner for participating in a press interview with his client, holding that the petitioner's conduct violated Disciplinary Rule 7-107(G) of the South Carolina Code of Professional Responsibility.[1] The Court rejected the ar-

---

[1] The interview took place in the prison where petitioner was incarcerated. At the time petitioner went to the prison with the reporter, the Department of Corrections had a policy governing press interviews with inmates on death row. The policy provided that an interview would be allowed with the approval of prison officials, defense counsel and the prosecutor. This policy, however, has no relevance to the disciplinary proceeding against petitioner. The rule was not posted by the Department of Corrections and was not distributed to attorneys. (Panel Report at 4-5). Neither the petitioner nor the reporter was aware of the rule. (Tr. 85, 87, 134). Further, the Department had already approved an interview

gument that an interview could be a legitimate part of the petitioner's legal representation. The Court also rejected the claim that Disciplinary Rule 7-107(G) was unconstitutional:

> We find the same to be without merit. No case in this state has been cited and no opinion of the United States Supreme Court has been indicated. All other courts, in which there is scant authority, including the United States Circuit Court of Appeal, are not binding on this Court and can, at most, be of interest or influencing.

In re Delgado, 306 S.E. 2d 591, 596 (S.C. 1983).

This case raises a significant First Amendment issue in two ways. First, the decision of the South Carolina Supreme Court is inconsistent with well-established First Amendment principles governing publicity during judicial proceedings. Decisions of this Court establish that such publicity may be punished only when the threat to the administration of justice is extremely serious. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 845 (1978); *Craig v. Harney*, 331 U.S. 367, 376 (1946); *Bridges v. California*, 314 U.S. 252, 263 (1941). Further, punishment may not be based on a mechanical application of the clear and present danger test, but must instead rest on a specific record that reflects a balancing of the evil flowing from the publicity with the need for freedom of expression. *Lankmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978); *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946).

While the Court has not applied these principles specifically to lawyers, the Court has indicated that communications by lawyers during trial proceedings may be entitled to First Amendment protection. In *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), the Court held that a trial

---

with petitioner's client. (Tr. 133-34). This case does not, therefore, involve the constitutionality of a rule that regulates prison interviews. *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974).

court order prohibiting communications between lawyers and potential members of a class was an abuse of discretion under Rule 23 of the Federal Rules of Civil Procedure. This Court held that such an order should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties. In addition, the Court noted that the order should be carefully drawn so as to limit speech as little as possible. *Id.* at 101-02. The Court did not decide the First Amendment issue raised by the case, but pointed out that the order involved serious restraints on expression.

Second, the case is significant because the decision of the South Carolina Supreme Court is in conflict with the decisions of both the Fourth and Seventh Circuit Courts of Appeal. *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) (en banc); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). Both courts held that the equivalent of South Carolina Disciplinary Rule 7-107(G) was unconstitutional on its face.

B. The Issue Of The Standard Of Proof Required By The Due Process Clause Of The Fourteenth Amendment In Disciplinary Proceedings.

The South Carolina Supreme Court found that the petitioner engaged in misrepresentation in violation of Disciplinary Rule 1-102(A)(4) when he completed a sign-in log at the prison. In doing so the Court did not state the standard of proof that must be met in order for a lawyer to be found guilty of a disciplinary violation, nor did it evaluate the evidence in light of any standard.[2] Further,

---

[2] A previous decision of the South Carolina Supreme Court held that proof in a disciplinary proceeding must be by clear and convincing evidence. *Burns v. Clayton*, 237 S.C. 316, 334, 117 S.E.2d 300, 309 (1960). The Court mentioned this decision as the basis of its authority to impose discipline, but the Court did not articulate or apply the clear and convincing standard.

the Court ignored the following uncontradicted evidence: (1) The petitioner did not have a reason to be deceptive when he completed the sign-in log at the prison. The log was not used to control admission to the prison (Tr. 36), but solely for subsequent review by the warden. (Tr. 29). Thus, regardless of what petitioner had written, he and the reporter would have been allowed to visit the client. (2) The uncontradicted evidence was that the log was not misleading. The warden, when he routinely reviewed the sign-in log, readily identified the reporter who accompanied petitioner. Further, the warden testified that he did not find the log misleading. (Tr. 30).

This case is significant because this Court has never ruled on the standard of proof required to convict a lawyer of a disciplinary violation, nor has it reviewed state court decisions to assure compliance with a standard. In *In Re Ruffalo*, 390 U.S. 544 (1968), this Court held that lawyers were entitled to the protections of due process in disciplinary proceedings. *Id.* at 550-51. In a line of cases, this Court has held that due process requires that proof be "clear and convincing" whenever an individual is threatened with a "significant deprivation of liberty" or "stigma." *Santosky v. Kramer*, 455 U.S. 745 (1982) (termination of parental rights); *Addington v. Texas*, 441 U.S. 418 (1979) (civil commitment); *Woodby v. I.N.S.*, 385 U.S. 276 (1966) (deportation); *Chaunt v. United States*, 364 U.S. 350 (1960) (denaturalization).

The Court has the opportunity in the present case to clarify the requirements of due process in connection with disciplinary proceedings against attorneys. Such clarification is particularly important at this time because rapid change in the legal profession is likely to generate complaints against attorneys who move beyond the traditional professional role. *Cf. In re Primus*, 436 U.S. 412 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *In re Hodges*, 303 S.E.2d 89 (S.C. 1983), *peti-*

tion for cert. filed, #83-184, 52 U.S.L.W. 3122 (July 29, 1983).

C. The Court Should Not Be Deterred From Granting Certiorari Because The Petitioner Was Also Found In Violation Of Another Disciplinary Rule.

The South Carolina Supreme Court found that petitioner violated Disciplinary Rule 7-108(B)(1) when he communicated with a juror prior to the trial of a case. The record clearly indicates that the "communication" was a brief, innocuous conversation that did not relate to the merits of the case. (Tr. 49-51, 129). The hearing panel concluded that although petitioner was in technical violation of the rule, no penalty was warranted. (Panel Report at 2-3). The South Carolina Supreme Court, strictly construing the rule, based its decision to discipline petitioner in part on the violation of this rule. Petitioner does not contest the decision of the South Carolina Supreme Court that he violated this disciplinary rule.

The fact that petitioner was found in violation of Disciplinary Rule 7-108(B)(1) should not, however, prevent this Court from granting certiorari and considering the serious constitutional claims raised by this case. This Court recently held that it would not refuse to review state court decisions that involved both state and federal grounds when the state and federal grounds are "interwoven," unless "the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate and independent grounds." *Michigan v. Long*, 103 S.Ct. 3469, 3476 (1983).

In this case the federal issues of the constitutionality of Disciplinary Rule 7-107(G) and due process were clearly interwoven into the decision. Further, the South Carolina Supreme Court did not indicate clearly and expressly in its opinion that the nonfederal ground was an independent basis for discipline. Indeed, comparison of this case with another recent decision of the South Caro-

lina Supreme Court shows that the decision in petitioner's case was based in part on the constitutional questions. In *In re Two Anonymous Members of the South Carolina Bar*, 298 S.E.2d 450 (S.C. 1982), the South Carolina Supreme Court dealt with a case in which the only charge of misconduct was a violation of Disciplinary Rule 7-108. The Court, after finding a violation of the rule, administered a private rather than a public reprimand.[3]

II. IF THE COURT DOES NOT GRANT CERTIORARI, IT SHOULD SUMMARILY VACATE THE DECISION OF THE SOUTH CAROLINA SUPREME COURT BECAUSE THAT DECISION VIOLATES THE PRINCIPLE THAT REQUIRES SPECIFIC FINDINGS OF IMMINENT HARM TO THE ADMINISTRATION OF JUSTICE BEFORE A COURT MAY INFLICT PUNISHMENT FOR TRIAL PUBLICITY.

In a line of cases, the most recent of which is *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), this Court has held that punishment for trial publicity can be imposed only after a court makes a specific inquiry into the actual facts of the case and weighs the potential evil flowing from the publicity against the need for freedom of expression. In particular, the Court condemned the mechanical restriction of speech. *Id.* at 842-43. Even if the Court decides that plenary review of this case is not appropriate, it should summarily vacate the decision of the South Carolina Supreme Court in light of the principles stated in *Landmark Communications*. This Court recently took such action in a case that in-

---

[3] The distinction between a public and a private reprimand is very significant. If an attorney is publicly reprimanded and is subsequently found guilty of any misconduct, the attorney must either be indefinitely suspended or disbarred. Rules on Disciplinary Procedure of the South Carolina Sup. Ct., Rule 8(C), 22 S.C. Code Ann. 166 (Law. Coop. 1982). The effect of subsequent misconduct after a private reprimand is not as drastic. *Id.* Rule 8(D).

volved the First Amendment right of lawyers to engage in direct mail advertising. *Alessi v. Committee on Professional Standards*, 103 S. Ct. 1763 (1983), *vac'g* 88 App. Div. 2d 1089, 451 N.Y. Supp. 2d 456 (1982).

CONCLUSION

This Court should grant plenary review of this case because it involves important issues about (1) the First Amendment right of a lawyer to make or participate in a press interview with his client while a post-conviction relief proceeding is pending and (2) the due process rights of an attorney in a disciplinary proceeding. If the Court concludes, however, that plenary review is not warranted, it should summarily vacate the decision of the South Carolina Supreme Court because that decision violates the well-established First Amendment principle that punishment for trial publicity may be imposed by a court only upon specific findings showing imminent harm to the fair administration of justice.

Respectfully submitted,

DALE T. COBB, JR.
(Counsel of Record)
BELK, HOWARD, COBB AND
CHANDLER, P.A.
2344 Cosgrove Avenue
Charleston, S.C. 29405
803-554-4291

NATHAN M. CRYSTAL
NANCY C. MCCORMICK
305 University of
South Carolina Law School
Columbia, S.C. 29208
803-777-4155

Attorneys for Amicus Curiae

November 30, 1983

APPENDIX

TABLE OF DISCIPLINARY RULES

1. Disciplinary Rule 1-102(A)(4) of the South Carolina Code of Professional Responsibility:

A lawyer shall not:

. . .

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

2. Disciplinary Rule 7-107(G) of the South Carolina Code of Professional Responsibility:

A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) Evidence regarding the occurrence or transaction involved;

(2) The character, credibility, or criminal record of a party, witness, or prospective witness.

(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(5) Any other matter reasonably likely to interfere with a fair trial of the action.

3. Disciplinary Rule 7-108(B)(1) of the South Carolina Code of Professional Responsibility:

During the trial of a case:

(1) A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.